

## **MATRIX FOR CALCULATION OF CIVIL PENALTIES FOR CONSTRUCTION SITES**

The proposed civil penalty may be based upon the seven delineated criteria or such combination as the City deems appropriate. The first three criteria (*i.e.*, 1. Harm Done to the Public Health or Environment; 2. Whether the Civil Penalty Imposed Will be Substantial Economic Deterrent to the Illegal Activity and 3. The Amount of Effort Put Forth by the Violator to Remedy this Violation) are used by the City to calculate daily penalties. Each of these criteria provide for the City identification of the number of points (generally referred to as the “value”) to be assessed, with each point equating to \$50.00/day in the penalty calculation. These daily penalties will be assessed for each day that a violation continues. Once the daily totals are calculated, the fourth and seventh criteria (*i.e.*, 4. The Economic Benefit Gained by the Violator and 7. Any Equities of the Situation which Outweigh the Benefit of Imposing any Penalty or Damage Assessment) will be used to adjust the total amount calculated, as appropriate. Any Unusual or Extraordinary Enforcement Costs Incurred by the City will be addressed in a separate action, apart from the civil penalty action, as the City deems appropriate. In no event shall the penalty ultimately assessed per day exceed \$5,000/day or be less than \$50/day.

### **1. Harm Done to the Public Health or Environment**

- a. Recordkeeping or reporting violation(s) other than item 1.b, below = 1
- b. Recordkeeping or reporting violation(s) pertaining to contaminants leaving the site = 1
- c. Other violation(s) which does not have the potential for contaminants to leave the site = 1
- d. Other violation(s) with the potential for contaminants to leave the site = 2
- e. Other violations(s) where contaminants are reasonably expected to have left the site = 3
- f. Other violation(s) where contaminants are reasonably expected to have entered the storm water drainage system and/or waters of the State = 4.
- g. Other violation(s) where there is potential or actual harm to public health or the environment = Potential Range of 4 – 100

See Note 1, below, for the definition of “contaminants.”

### **2. Whether the Civil Penalty Imposed Will be Substantial Economic Deterrent to the Illegal Activity**

In consideration of whether a civil penalty will be a substantial economic deterrent to the illegal activity, the City may consider the number of violations that the civil penalty is addressing, as well as whether the violator is a recalcitrant violator. Both of these factors are pertinent in determining whether there will be a substantial economic deterrent to the illegal activity. Where there are multiple violations by the same entity (*e.g.*, company or person) such action reflects more of an indifference to compliance with

the City's MS4 requirements and, as such, generally reflects a need for greater deterrence. Where the same entity has been subject to previous civil penalties for MS4 violations, again, such situation reflects a need to impose a higher penalty to deter future illegal activity.

This criterion provides for the penalty assessment to add the values determined under subsections 2.a + 2.b to determine the Substantial Economic Deterrent value.

- (a) Table 1 is based upon the premise that a higher substantial economic deterrent would be necessary for a current violator who has already been the subject of civil penalties during the prior year, whether at the same or a different site. Furthermore, where the imposition of a dollar per day amount in the past did not provide sufficient economic incentive for the violator to avoid new or continued violations, further economic deterrence would be deemed appropriate. Finally, the table also accounts for the number of violations involved in the current (new) enforcement action with a greater number of violations deemed to require greater economic deterrent.

The value in this subsection 2.a is determined by the Table 1 matrix. The top column addresses the number of violations being addressed by the current (*i.e.*, the new) civil penalty action. The Table is divided into Subsections A through D depending upon the number of civil penalties imposed during the "prior year." Subsection A would be applicable where there are no prior civil penalties imposed on the violator in the prior year. Subsections B, C, and D would apply where there were civil penalties imposed upon that violator during the prior year, with these subsections being based upon whether there was one, two, or three or more civil penalties imposed during the prior year, respectively. The left hand column addresses the total dollar amount of the prior civil penalties. The reference to the "prior year" is intended to mean the twelve-month period preceding the date of the new enforcement action. As such, it is a rolling 12-month period.

Notice associated with the imposition of a civil administrative penalty by the City of Memphis involves (a) reasonable notice of the assessment of any penalty and (b) a 30-day time period after the damage assessment or civil penalty is served for the violator to file a petition for review with the City. When the City provides two separate notices (*i.e.*, the first letter putting the violator on notice that the City will be seeking a penalty for violations and the second notice setting forth the dollar amount and triggering the thirty-day period for filing a petition for review), the twelve-month period shall run from the second notice (*i.e.*, notice of the dollar amount of the penalty). For example, if the second notice is served on the violator in June 2012, under this criterion the City would look at the period from June 2011 through May 2012.

The total dollar amount of prior year penalties imposed is determined based on whether (a) the violator paid a civil penalty that had been assessed for violations that took place during the prior year or (b) the payment of a penalty for a violation(s) that occurred during the prior year is due (*i.e.*, no further appeal rights exists) even though the violator has not yet paid the penalty.

Furthermore, Table 1 is based upon the dollar amount of the prior civil penalties. Subsections B through D are divided based on whether the total dollar amount of the prior penalties was between \$50 - \$500, \$501 - \$2,500, \$2,501 - \$5,000, \$5,001 - \$10,000, \$10,001 - \$25,000, \$25,001 - \$50,000 or > \$50,000. The value is determined by adding the total dollar amounts of each of the penalties imposed in the civil penalty actions during the prior year. For example, if during the prior twelve months, a violator was subject to two civil penalties, with the first civil penalty being \$1000 and the second civil penalty being \$4500, the left hand value would be determined by looking in subsection C (“Two Civil Penalties Imposed in Prior Year”) for the value that would correspond to \$5500 (*i.e.*, \$1000 + \$4500).

The top row identifies the number of violations being addressed by the current (new) civil penalty. This is divided into the following categories: 1-3 violations, 4-6 violations, 7-9 violations, 10 or more violations. Generally, the more violations involved in the current enforcement action, the greater the economic deterrence deemed appropriate. When the City identifies violations and decides to impose a penalty, the City’s first letter, notice to the violator, will identify the underlying violations (and the number of violations). See Note 2, below. When the violator rectifies these violations it is incumbent upon the violator to notify the City that the violations have been corrected so that the City can undertake an inspection to confirm whether the violations have, in fact, been rectified. The second letter assessing a penalty will impose the penalty for each day commencing on the date the City initially identified the violation up to the date of the violator’s notice of compliance subject to the violator having truthfully notified the City that violations have been corrected (in which case the City would undertake a follow-up inspection prior to the second letter). Subsequent penalties may be assessed for any violations which have not been rectified by the time the City assesses the penalty and for any new violations.

The City may use the following matrix in determining an appropriate penalty to be imposed under this second criterion.

**TABLE 1**

	<b>Number of Violations Addressed by the New Civil Penalty Action</b>			
	<b>1-3 Violations</b>	<b>4-6 Violations</b>	<b>7-9 Violations</b>	<b>10 or more Violations</b>
	<b>A. <u>NO PRIOR CIVIL PENALTY IMPOSED</u></b>			
No Prior Civil Penalty Imposed in prior year	0	1	2	3
<b>Total \$ Amount of Prior Year Penalties</b>	<b>B. <u>ONE CIVIL PENALTY IMPOSED IN PRIOR YEAR</u></b>			
\$50 - \$500	1	2	2	4
\$501 - \$2500	1	2	2	4
\$2501 - \$5000	2	4	4	6
\$5001 - \$10,000	2	4	6	7
\$10,001 - \$25,000	2	4	6	7
\$25,001 - \$50,000	3	4	6	8
> \$50,000	4	6	8	10

	<b>C. <u>TWO CIVIL PENALTIES IMPOSED IN PRIOR YEAR</u></b>			
\$50 - \$500	4	6	8	10
\$501 - \$2500	4	6	8	12
\$2501 - \$5,000	6	8	10	13
\$5001 - \$10,000	8	10	12	15
\$10,001 - \$25,000	10	12	14	16
\$25,001 - \$50,000	12	14	16	18
> \$50,000	14	16	18	20
	<b>D. <u>THREE OR MORE PRIOR CIVIL PENALTIES IMPOSED IN PRIOR YEAR</u></b>			
\$50 - \$500	14	16	16	20
\$501 - \$2500	14	16	20	24
\$2501 - \$5,000	16	20	24	28
\$5001 - \$10,000	20	24	28	30
\$10,001 - \$25,000	24	28	30	32
\$25,001 - \$50,000	28	30	32	36

> \$50,000	32	34	36	40
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(b) Consideration of History of Other Enforcement Actions: A greater economic deterrence is deemed to be required where the violator has a history of other enforcement actions. While subsection 2(a), above, accounts for civil penalties imposed during the prior year, it does not address the full array of enforcement actions that the City may have taken against the violator in the past. This includes, but is not limited to, notice of violations (NOVs), show cause meetings, compliance orders, and civil penalties actions imposed more than a year ago (i.e., civil penalty actions that are not considered in the left column in subsection 2(a), above). The City may provide for an additional imposition of a penalty under this subsection 2(b) where the City finds that the violator has a history of being subject to other enforcement actions. Range: 0 – 100.

### 3. **The Amount of Effort Put Forth by the Violator to Remedy this Violation**

The amount of effort put forth by the violator to remedy the violation(s) can be ascertained by reviewing the results of the efforts. This penalty policy provides violators the incentive to expeditiously rectify violations. The first three categories under this criterion are based upon whether all the violations have been remedied within 3 days, 10 days or 29 days of receipt of written notice (*e.g.*, letter, e-mail, etc.) of the violation. For the purposes of calculating days, for the 3-day and 10-day standard, only business days (*i.e.*, any day excluding weekends and City-observed holidays) are counted. The 29-day standard, in contrast, is based upon calendar days. Where an e-mail is sent, the date of receipt is deemed to be the date the e-mail was sent.

Where the City issues a notice of violation (“NOV”) or otherwise identifies a violation in writing to the violator, the time period under this criterion is triggered by the receipt of such letter, e-mail or other writing from the City. As such, should the City decide to subsequently assess a civil penalty, the time the violator takes to remedy the identified violations in response to the NOV, e-mail or other writing will affect the amount of the penalty ultimately assessed.

Where all the identified violations have been remedied within three (3) days, then the daily penalty amount calculated under the first two criteria will be **reduced** by ten (10) percent. Where all of the identified violations have been remedied within four (4) – ten (10) days, then no additional daily penalty will be imposed under this third criterion. Where all of the identified violations have been remedied within eleven (11) – twenty-nine (29) days, then the daily penalty amount will be increased as indicated in section III of the table below. The amount added, as indicated, will also depend upon the number of violations identified in writing by the City. The twenty-nine day period in this third criterion accommodates the timing associated with a penalty where the first civil penalty letter puts the violator on notice that the City will be seeking a penalty for violations after thirty-days. In light of the fact that the City would be imposing a penalty after the thirtieth day, it is imperative that the City be immediately notified (*i.e.*, by e-mail sent to Bobby.allen@memphistn.gov) when the violations have been remedied. Otherwise, failure to

notify the City would result in the violator being identified as being subject to the higher penalties under section IV of the table below which applies where all the violations were not remedied within 29 days.

The fact that a violation has been remedied within any of the time frames set forth in the Table below will only affect the amount of penalty, as indicated. It does not, however, extend a compliance date. In no event shall a violator appropriately assert that it was not in violation because it remedied the violation within any timeframe provided below.

**TABLE 2**

<b>I. REMEDIED ALL VIOLATIONS WITHIN 3 DAYS*</b>				
	1-3 Violations	4-6 Violations	7-9 Violations	10 or More Violations
	-10%	-10%	-10%	-10%
<b>II. REMEDIED ALL VIOLATIONS WITHIN 10 DAYS*</b>				
	1-3 Violations	4-6 Violations	7-9 Violations	10 or More Violations
	0	0	0	0
<b>III. REDMEDIED ALL VIOLATIONS WITH 29 DAYS*</b>				
	1-3 Violations	4-6 Violations	7-9 Violations	10 or More Violations
	4	6	8	10
<b>IV. DID NOT REMEDY ALL VIOLATIONS WITHIN 29 DAYS</b>				
	Did Not Remedy 1-3 Violations	Did not Remedy 4-6 Violations	Did not Remedy 7-9 Violations	Did not Remedy 10 or More Violations
	6	10	16	20

- \* Immediate notice that all violations have been remedied must be provided to the City to provide the City the opportunity to confirm such assertion prior to the assessment of the penalty.

To the extent the violator has made significant efforts to remedy the violation and, due to no fault of the violator, was unable to do so, such efforts may be taken into consideration under the seventh criterion, below.

4. **The Economic Benefit Gained by the Violator**

One of the goals of the civil penalty action is to remove the economic benefit associated with noncompliance. The violator should not be in a better situation from noncompliance than it would have been had it achieved compliance. Calculation of the economic benefit is not an exact science, and the City may make educated estimates of the economic benefit associated with noncompliance. As recognized by courts (*see, e.g., United States of America v. the Municipal Authority of Union Township*, 150 F.3d 259 (3<sup>rd</sup> Cir. 1998)) the determination of economic benefit does not require an elaborate or burdensome evidentiary showing. Instead, the City may provide a reasonable approximation of economic benefit in calculating economic benefit. Where noncompliance with BMPs or other requirements occur, the City may add the economic component to the total of the daily penalties calculated under the first three criteria in determining the total penalty. Economic benefit may include the cost of putting in a BMP, as well as avoided day-to-day maintenance costs.

Economic benefit may be calculated using (a) known significant avoided costs, (b) estimates based upon published criteria (*e.g., R.S. Means, Site Work and Landscaping* or (c) such other approach as the City deems appropriate. This may include, for example, the City's general knowledge of the costs of other sites to comply with the underlying requirement.

5. **Any Unusual or Extraordinary Enforcement Costs Incurred by the City**

The City may also assess damages proximately caused by the violator to the City which may include any reasonable expenses incurred in investigating and enforcing violations of this chapter, or any other actual damages caused by the violation. The assessment of damages and expenses will be addressed, if applicable, separate and apart from the civil penalty. Therefore 0 will be used when imposing the noncompliance penalty.

6. **The Amount of Penalty Established by Ordinance or Resolution for Specific Categories of Violations, if Applicable**

Not applicable = 0



7. **Any Equities of the Situation which Outweigh the Benefit of Imposing any Penalty or Damage Assessment**

The City may reduce the penalty should it determine that the equities of the situation outweigh the benefit of imposing a penalty. If these circumstances exist, the City may, subject to its discretion, evaluate these circumstances on a case-by-case basis, otherwise not applicable = 0

Subject to the City's sole discretion (and subject to such conditions as the City deems appropriate), the City may also agree to reduce a penalty based upon a violator agreeing to undertake an environmental project (*e.g.*, green infrastructure, water gardens) that the violator is not otherwise legally obligated to perform. This approach, based upon the concept of a Supplemental Environmental Project ("SEP") or State Project as set forth in EPA or State settlement policies, respectively, allows the City (as the City deems appropriate) to allow the violator to undertake an environmentally beneficial project in lieu of paying all or part of a penalty. The City may require the violator to provide written confirmation that it is not otherwise required (*e.g.*, by its contract with an owner or a site) to undertake the agreed-upon work. Furthermore, the City may require confirmation that the violator is not being paid for the work described in the project.

**Notes:**

- 1) Contaminants as defined in Sections 33-206 and 33-207 of City Ordinance #4538.
- 2) Separate infractions will be determined at sole discretion of City.
- 3) Civil penalty ranking and/or issuance does not prevent City from taking other actions.

**EXAMPLE PENALTY CALCULATIONS**

**Example 1:** Joe Contractor is involved in construction activities at two sites in the City of Memphis. In the prior twelve-month period, Joe Contractor had been assessed and paid a penalty of \$1,200 associated with noncompliance at its Site #1. Other than that, Joe Contractor has not been subject to other enforcement actions by the City. Now, at site #2, Joe Contractor is again ignoring the MS4 program legal requirements. An inspection by the City identified a significant amount of soil and storm water running off-site and entering a storm water inlet and that the requisite BMPs had not been implemented. A Notice of Violation (NOV) was sent to Joe Contractor identifying five violations. Joe Contractor e-mailed the City two days later and indicated that the violation has been remedied. The City undertook an inspection and confirmed that the violation has in fact been remedied.

Under the first criterion (Harm Done to the Public Health or Environment), a value of 4 under paragraph 1.f would apply since the contaminants have entered the storm water drainage system.

The second criterion (Whether the Civil Penalty Imposed Will be Substantial Economic Deterrent to the Illegal Activity) is divided into two subparts. First under section 2.a, Table 1 indicates a value of 2 should be assigned as follows:

- Subsection B. One Civil Penalty Imposed in Prior Year
- Row for \$501-\$2500 under “Total \$ Amount of Prior Year Penalties” inasmuch as the prior penalty was \$1,200
- Column for 4-6 violations under “Number of Violations Addressed by the New Civil Penalty Action”

Under section 2.b of the second criterion (Consideration of History of Other Enforcement Actions), Joe Contractor has not been subject to other enforcement actions by the City other than the recent NOV and the prior penalty action (which is already accounted for under section 2.a, above). The City is not assessing an additional penalty under subsection 2.b.

The third criterion (Amount of Effort Put Forth by the Violator to Remedy the Violation) would result in a ten percent reduction of the amount calculated under the first two criteria. That is because, Joe Contractor remedied the violation within a three day period, provided notice to the City of such action, and the City confirmed that fact.

Under the fourth criterion (Economic Benefit Gained by the Violator), the City is assessing \$0. As Joe Contractor spent the dollars necessary to achieve compliance and remedied the violation in two days, absent other information its economic benefit appears to be *de minimis*. As such, the value is \$0.

Under the fifth criterion (Any Unusual or Extraordinary Enforcement Costs Incurred by the City), the City is not, as part of this civil penalty action, seeking reimbursement of damages or enforcement costs incurred by the City. The City reserves its right to recover such costs in a future action as it deems appropriate.

Under the sixth criterion (Amount of Penalty Established by Ordinance or Resolution for Specific Categories of Violations, if Applicable), the City has not established a penalty amount by ordinance or resolution pertaining to this category of violation. As such, it is inapplicable, and a value of 0 is provided under this criterion.

Under the seventh criterion (Any Equities of the Situation which Outweigh the Benefit of Imposing any Penalty or Damage Assessment), there have been no equities identified. As such, this section is inapplicable and a value of 0 is provided under this criterion.

The total penalty for Joe Contractor would be \$540. This is based upon a per day penalty of \$300 calculated based upon a value of 4 under the first criterion and a value of 2 under the second criterion =  $6 \times \$50 = \$300$ . With Joe Contractor being in violation for 2 days, the penalty would be a total of \$600, but it is then reduced by 10% under the third criterion, thus resulting in a total penalty of \$540.

**Example 2:** In this example, the facts are the same as example 1, except that Joe Contractor did not come into compliance within three days and had two prior civil penalties imposed in the prior year for a total of \$2,800. When Joe Contractor received the NOV, he contacted his construction products supplier, and was told that if he waited five days, the supplies he was seeking would be on sale and he would save \$1,000. So, Joe Contractor decided to wait for the cheaper supplies and did not come into compliance until the sixth day. At that time he notified the City and the City's inspection confirmed that compliance was achieved.

The first criterion would be the same as above and a value of 4 would be imposed. As to the second criterion, a value of 8 would be imposed under subsection 2.a since he is now under subsection C ("Two Civil Penalties Imposed in Prior Year") and is in the row that corresponds to \$2,500 - \$5,000. An additional value is not being imposed under section 2.b of the second criterion since the prior enforcement actions were addressed by civil penalties and are already accounted for in section 2.a. As such, a combined value of 14 would be imposed. Under the third criterion, however, Joe Contractor would not get a ten percent reduction. Inasmuch as compliance was achieved within ten days of receipt of the NOV, a value of 0 applies under Part II of Table 2. Under the fourth criterion, Joe Contractor had an economic benefit of \$1,000 associated with the reduced costs for the supplies. As such, a \$1,000 is assessed under this fourth criterion. The fifth, sixth and seventh criterion would be the same as above.

The total penalty for Joe Contractor under this second example would be \$4,500. This is based upon a per day penalty of \$700 (combined value of  $14 \times \$50$ ). This amount would then be multiplied by 5 (days of noncompliance) = \$3,500. When adding the \$1,000 economic benefit, the penalty would total \$4,500.

**Example 3:** In this example, the facts are the same as example 2, except that Joe Contractor waited thirty days for the lower priced supplies to arrive and, as such, was in noncompliance for thirty days. The first two criteria would still have a combined value of 14. However, under the third criterion, inasmuch as Joe Contractor did not remedy all the violations within 29 days, under section IV of Table 2, a value of 10 is added under the column "Did not Remedy 4-6 Violations." As such, this raises the total values to 24. With a per day penalty of \$1,200 (*i.e.*,  $24 \times \$50$ ), 30 days of violation, and an economic benefit of \$1,000, the total penalty would now be  $(\$1200 \times 30) + \$1,000 = \$37,000$ .

**Example 4:** In this example, the facts are the same as example 3, except that Joe Contractor upon receiving the NOV contacted all the suppliers who potentially carried a specialized item he needed to achieve compliance, documented the fact that no one could get the

specialized item to him any faster than thirty-days, and undertook such steps as he otherwise reasonably could to minimize the illegal activity while waiting for the equipment. Under this situation, the City would take such factors into consideration under the seventh criterion and significantly reduce the \$37,000 penalty.